Supreme Court, U. S.
FILED
DEC 4 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 79-865

PHILIP SCHIFALACQUA, a/k/a
PHILIP A. SCHIFALACQUA, AN
INCOMPETENT BY HIS GUARDIAN
REV. ILDEBRANDO E. SCHIFALACQUA,
Petitioner

v.

CONTINENTAL CASUALTY COMPANY, a/k/a
CNA INSURANCE,
Respondent

and

S. Z. GOODSTEIN & COMPANY, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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IN THE
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NO.

PHILIP SCHIFALACQUA, a/k/a
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INCOMPETENT BY HIS GUARDIAN
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v.

CONTINENTAL CASUALTY COMPANY, a/k/a
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Respondent

and

S. Z. GOODSTEIN & COMPANY, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Philip Schifalacqua, a/k/a Philip A. Schifalacqua, an incompetent by his guardian Rev. Ildebrando E. Schifalacqua, petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit in the entitled case rendered on September 10, 1979.

OPINIONS BELOW

The Court of Appeals for the Third Circuit did not file an opinion. Its judgment order appears as Philip Schifalacqua, a/k/a Philip A. Schifalacqua, an incompetent by his guardian Rev. Ildebrando E. Schifalacqua v. Continental Casualty Company, a/k/a CNA Insurance and S. Z. Goodstein & Company, Inc., No. 78-2242 (3d Cir., decided September 10, 1979).

The District Court's Order and Memorandum is also unreported. It appears as Philip Schifalacqua, a/k/a Philip A. Schifalacqua, an incompetent by his guardian, Rev. Ildebrando E. Schifalacqua v. Continental Casualty Company, a/k/a CNA Insurance and S. Z. Goodstein & Company, Inc., Civil Action No. 78-2009 (E. D. Pa., decided July 21, 1978). The order and memorandum of the District Court and the judgment order of the Court of Appeals are printed in the appendix of this petition.

JURISDICTION

Petitioner seeks review of the judgment order of the United States Court of Appeals for the Third Circuit, dated September 10, 1979, and the order of the United States District Court for the Eastern District of Pennsylvania, dated July 21, 1978, which it affirmed.

Jurisdiction is conferred upon the Supreme Court by Title 28, U.S. Code, Section 1254(1)

The jurisdiction of the Supreme Court is invoked because the District Court, in dismissing this action, decided an important state question in a way in conflict with applicable state law, thereby depriving petitioner of property without due process of law. The Court of Appeals, in affirming that decision without opinion, has so far sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

QUESTION PRESENTED

Where the District Court and the Court of Appeals have refused to adjudicate the contractual right of an incompetent suffering from presenile dementia to recover "sickness" disability benefits under his group disability insurance policy on the

ground that his right thereto could have been adjudicated (although it was not) in a prior action between the same parties in which the incompetent had sought recovery of "accident" disability benefits under different provisions and factual requirements of the same policy, thereby giving the doctrine of res judicata a broader scope than that given by the decisional law of the Commonwealth of Pennsylvania, have the lower courts deprived the incompetent of his property without due process of law?

CONSTITUTIONAL PROVISIONS

Constitution of the United States of America, Amendment 5, provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Jurisdiction of the United States District Court to remove this action from the Court of Common Pleas of Philadelphia, Pa., was based upon the provisions of 28 U.S.C. §1441(a) and (c) and 28 U.S.C. §1332 (diversity of citizenship and amount in controversy in excess of $10,000.00, exclusive of interest and costs). The jurisdiction of the United States Court of Appeals for the Third Circuit was based upon 28 U.S.C. §1291 providing for appeals from final judgments of the District Court.

Philip A. Schifalacqua, the incompetent plaintiff, was a medical doctor residing and practicing in Philadelphia, Pa. He had been insured by Continental Casualty Company under the Philadelphia County Medical Society's group disability income insurance policy No. 5-A-5618 for almost twenty years. While insured under that policy and beginning at least as early as April of 1973, Dr. Schifalacqua became increasingly unable to handle his daily affairs due to the development of a sickness known as "pre-senile dementia". However, his disability was not recognized immediately by his family and professional associates so that he was able to continue in his employment at full pay until September 6, 1973, when he was hospitalized for injuries suffered in an automobile accident.

While Dr. Schifalacqua was recovering from his injuries, his sister gained access to his papers and discovered that the premium due on Continental's policy on July 1, 1973, had not been paid by him. Therefore on September 29, 1973, she tendered her check in payment of that premium and it was unconditionally accepted and cashed by Continental's administrator, S. Z. Goodstein & Co., Inc. (co-defendant in this action).

On or about October 19, 1973, Dr. Schifalacqua's sister and other members of his family were informed by his physicians that he was incompetent and totally and permanently disabled. His family notified defendants of Dr. Schifalacqua's illness and disability in November, 1973, whereupon defendants sent claim forms to be executed by his physicians and others. The completed forms were returned to respondents on or about December 11, 1973.

By letter dated January 23, 1974, defendants informed plaintiff's family for the first time that plaintiff's policy had lapsed on July 1, 1973 for failure to pay the semi-annual premium due on that date. Defendants denied any liability to pay plaintiff any benefits under the subject policy.

In consequence, the first action was commenced against Continental (but not against S.Z. Goodstein & Co., Inc., which is a co-defendant in the subject

action) in the Court of Common Pleas of Philadelphia, Pa. Continental then removed the action to the U. S. District Court for the E. D. of Pa., where it was docketed as Civil Action No. 75-1266.

In the prayer of the Amended Complaint filed in that first action, plaintiff requested, inter alia, a decree in equity "establishing and ordering" that Continental was liable to plaintiff under the contract and required to pay $1,500.00 from September 6, 1973 until such time as his total disability shall cease. Such benefits are only provided by Part II, A, of the policy, entitled "Lifetime Monthly Accident Indemnity", which reads as follows:

> "Total Disability. When injury, commencing while the policy is in force as to the Insured, wholly and continuously disables and prevents the Insured from performing the duties of his occupation, the Company will pay the Monthly Indemnity stated in the Schedule hereof for the period the Insured shall be so disabled, not to exceed sixty months as the result of any one accident. After the payment of Monthly Indemnity for sixty months as aforesaid, the Company will continue the payment of Monthly Indemnity so long as the Insured

> shall live and be wholly and continuously disabled by reason of said injury from performing the duties of any gainful occupation for which he is reasonably fitted."

The District Court adjudged that plaintiff was entitled to recover such benefits. That decision was appealed by Continental, and was reversed by the Court of Appeals for the Third Circuit. Schifalacqua v. CNA Ins., 567 F. 2d 1255 (C.A. 3, 1977).

Plaintiff petitioned the Court of Appeals for a rehearing en banc, urging that the mandate should not have directed judgment in favor of Continental but should have directed the District Court to enter judgment for plaintiff for "Monthly Sickness Indemnity" and "Partial Disability" benefits if the court, upon rehearing, determined that the panel had correctly found that plaintiff was not entitled to "Lifetime Monthly Accident Benefits". He also asked the full court to determine that the panel's finding was in error. The petition for rehearing was denied without opinion.

Plaintiff then brought the subject action in the Court of Common Pleas of Philadelphia to recover the "Monthly Sickness Indemnity" benefits of $1,500.00 per month for 24 months provided by Part III of Continental's policy as follows:

"When sickness, commencing while the policy is in force as to the Insured, wholly and continuously disables and prevents the Insured from performing the duties of his occupation, the Company will pay the Monthly Indemnity stated in the Schedule hereof for the period the Insured shall be so disabled and under the regular care and attendance of a legally qualified physician or surgeon, other than himself, not to exceed twenty-four months for any one sickness. Such indemnity will be paid from the first day of hospital confinement or the fourth day of such disability, whichever occurs first."

The second cause of action asserted in the subject complaint sought damages from Continental and S. Z. Goodstein & Company, Inc., for their wrongful denial of sickness benefits under the policy, and the suffering inflicted upon the incompetent plaintiff in consequence thereof. This second action was also removed by defendants to the U. S. District Court for the E. D. of Pa., where it was docketed as Civil Action No. 78-2009.

The defendants then filed a motion to dismiss the action in the District Court claiming that the

subject matter of this second action had been determined in the first action. Plaintiff answered that the two causes of action asserted in this action had not been decided in the first action. The motion was decided on briefs without oral argument.

In its "Memorandum and Order" of July 21, 1978, dismissing this action, the District Court held that plaintiff's claim against Continental under Part III of the policy was barred by the doctrine of res judicata and the law of the case because the claim for sickness benefits "could have been asserted in the earlier litigation between the same parties", even though the Court recognized that the claim for sickness benefits had never been adjudicated.

Plaintiff duly appealed from that decision to the United State Court of Appeals for the Third Circuit (No. 78-2242). The Court of Appeals, also without hearing oral agrument, affirmed the District Court on September 10, 1979, issuing its judgment order in lieu of a formal mandate on October 2, 1979. It did not render an opinion. The decisions of the lower courts in the second action have not been reported.

Petitioner petitions for a Writ of Certiorari to this Honorable Court to review the judgment order of the Court of Appeals and the District Court's judgment, order and memorandum which it affirmed.

ARGUMENT

Due to a "gross and obvious" error in its interpretation of the doctrine of res judicata, the District Court precluded determination of a cause of action which had never been adjudicated in the first action between these parties. The Court of Appeals compounded that error by affirming it without benefit of oral argument and without writing an opinion. The opinion writing process might have revealed to the Court of Appeals just how "gross and obvious" the District Court's error had been.

While petitioner recognizes that not every judicial mistake amounts to a denial of constitutional immunities, and that "the error must be gross and obvious, coming close to the boundary of arbitrary action" or that there must be "absolute disregard" of the petitioner's right to recover his benefits, as stated in Roberts v. New York, 295 U.S. 264, 277-8, 79 L. Ed 1429,1435, 55 S.Ct. 689 (1935), here the errors of the lower courts do warrant such description.

This court has held that application of the doctrines of res judicata and collateral estoppel must meet the requirements of the due process clauses of the Fifth Amendment [Compare, Blonder-Tongue Lab., Inc. v. Univ. of

Illinois Foundation. 402 U.S. 313, 28 L. Ed 2d 788, 91 S. Ct. 1434 (1971)] and the Fourteenth Amendment [Compare Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 682, 74 L. Ed. 1107, 1114, 50 S. Ct. 451 (1930); Hansberry v. Lee, 311 U.S. 32, 85 L. Ed. 22, 61 S. Ct. 115 (1940)] Here the incompetent plaintiff has been deprived of his day in court through a misconceived application of those doctrines to a cause of action never before pleaded, litigated or adjudicated in the prior action between the parties. While it is true that in Dr. Schifalacqua's second action to recover his sickness disability benefits under Continental's policy "the averments of the Complaint are virtually identical to the averments of the Complaint in the original action, and the findings of fact made by [the District Court] in that earlier action" [District Court's Memorandum, p.3 (8a-9a)] it also remains true that the same identical facts gave rise to two separate causes of action under different provisions of the same contract.

The District Court had found certain facts in the original action, and repeated those findings at p. 1 of its Memorandum, to wit:

> "Beginning some time before April of 1973, at a time when the policy was in full force and effect, Dr. Schifalacqua became afflicted with "pre-senile dementia"

> as a result of which his ability to conduct his daily affairs gradually deteriorated." (4a-5a)

In the original action, the cited facts described a pre-existing sickness upon which the effects of the injuries received in the accident of September 6, 1973 were superimposed to cause the doctor's total disability. If the policy had been in effect when the accident occurred on September 6, 1973, Dr. Schifalacqua would have been entitled to "accident" benefits under Part II, A, of the policy. However, the Court of Appeals in the original action concluded that the policy was not in effect on that date, so his cause of action to recover "accident" benefits failed. Schifalacqua v. Continental Cas. Co., 567 F. 2d 1255 (C.A. 3, 1977). In the second action, the above quoted factual findings of the original action in themselves entitled Dr. Schifalacqua to "sickness" benefits under Part III of the policy. Accordingly, the doctrine of collateral estoppel, at a later stage in the pleadings, should have been applied to render judgment in favor of Dr. Schifalacqua, since those judicially determined facts would have permitted no other result. Cf., Sea-Land Services v. Gaudet, 414 U. S. 573, 593, 39 L. Ed. 2d 9, 25, 94 S.Ct. 806 (1974) rehearing den. 415 U.S. 986, 39 L. Ed. 2d 883, 94 S. Ct. 1582. However, the pleadings never reached that later stage, because the District Court declared, in sustaining defendants'

motion to dismiss: (9a-10a)

> "If Dr. Schifalacqua's total disability is attributable to disease which had its onset while the group insurance policy was in force, it is indeed unfortunate that the defendant should be able to avoid payment of the benefits provided for disability caused by illness, merely because plaintiff initially sought to recover lifetime accident-disability benefits. But I find it impossible to avoid the conclusion that all claims against Continental under the policy are barred by the doctrine of res judicata and law of the case. Unquestionably, claims for sickness benefits could have been asserted in the earlier litigation between the same parties."

The District Court cited no decisions supporting its conclusion, which was in conflict with the decisions of this court and the decisions of the appellate courts of Pennsylvania as well, whose law should have governed application of those doctrines [as the parties had agreed in the lower courts]. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487 (1938).

This court recognized in Moragne v. States Marine Lines, 398

U.S. 375, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970) that a single tortious act might result in two distinct, though related harms, giving rise to two separate causes of action. In Sea-Land Services v. Gaudet, 414 U.S. 573, 578, 39 L. Ed. 2d 9, 17, 94 S. Ct. 806 (1974) the court held that a second action for wrongful death was not barred by the deceased longshoreman's prior judgment in an action for the personal injuries which later led to his death. The court said, at 414 U.S. 578-579, 39 L. Ed. 2d 17-18:

> "Because the respondent's suit involves a different cause of action, it is not precluded by res judicata. For res judicata operates only to bar
>
> 'repetitious suits involving the same cause of ation [The bar] rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissable matter

> which might have been offered for that purpose.' Cromwell v. County of Sac, 94 U.S. 351, 352, [24 L Ed 195]. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, 'Res Judicata,' 38 Yale L J 299; Restatement of the Law of Judgments, §§ 47, 48." Commissioner v. Sunnen, 333 US 591, 597, 92 L Ed 898, 68 S Ct 715 (1948)."

The appellate courts of Pennsylvania are in agreement with the principles quoted above. They also have held that it must appear with certainty that the question in controversy in the second suit was litigated and decided in the first suit and that the issue claimed to be settled was directly involved in the prior case and decided as a necessary part of the decision: Schenley Farms v. McGovern, 312 Pa. 67, 167 A. 779 (1933); Hickey v. Mackie, 308 Pa. 306, 162 A. 280 (1932); but a judgment is not conclusive of matters which the party had the option to put in litigation, but in fact did not: LeBeau v. LeBeau, Pa. Super., 393 A. 2d 480 (1979); Bassis v. Rutenberg, 177 Pa. Super. 339, 110 A. 2d 897 (1955); Cf. Larsen v. Northland Transp. Co., 292 U.S. 20, 78 L. Ed. 1096, 54 S. Ct. 584 (1934). The merits of the controversy must have been adjudicated or the doctrine

of res judicata cannot apply: Scharf v. Richard DeCou, 320 Pa. 552, 183 A. 41 (1936); Schwan v. Kelly, 173 Pa. 65, 72 (1896).

In order to make a matter res judicata there must be identity of the thing sued for, which is not present in the instant case. Bennett v. Erwin, 325 Pa. 330, 189 A. 675, 109 A.L.R. 422 (1937); Notoro v. Hyer Est., 239 Pa. Super. 10, 14, 361 A. 2d 766 (1976). There must be identity of the cause of action, which is also absent here. Long v. Stout, 305 Pa. 310, 157 A. 607 (1931); LeBeau v. LeBeau, Pa. Super. 393 A. 2d 480 (1979).

It has never been the law of Pennsylvania, where both of these actions were originally instituted, that a plaintiff must bring every possible cause of action he possesses against a defendant arising from the same set of facts in one action or he will be forever barred by the judgment from bringing a second suit on the additional causes of action. Thus, counsel for incompetent could not have anticipated when he prepared and filed the Complaint in the first action in the Court of Common Pleas of Philadelphia that he was running the risk that upon removal, the federal courts would bar the incompetent's alternative claim for "sickness" benefits if he did not join that claim with the incompetent's cause of action to recover "accident" benefits, should the first action be lost. The dictum of Justice Brandeis relative to an analogous unforeseeable

elimination of remedy by a state court in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 682, 74 L. Ed. 1107, 114, 50 S. Ct. 451 (1930) should also apply to the federal judiciary:

> "Whether acting through its judiciary or through its legislature a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was afforded to him some real opportunity to protect it. Compare Postal Teleg. Cable Co. v. Newport, 247 U.S. 464, 475, 476, 62 L. Ed. 1215, 1220, 1221, 38 Sup. Ct. Rep. 566."

CONCLUSION

The incompetent plaintiff in this case has been deprived of the insurance protection against sickness disability for which he paid defendants over the years and to which he was entitled on the basis of facts found in the original action. This miscarriage of justice has resulted from the gross and obvious error of the lower courts in failing to apply either Pennsylvania law or the law enunciated by this honorable court on the subject of res judicata. The lower court decisions were made without benefit of oral

argument by counsel and without citation of any authority in support thereof. Their refusal to adjudicate the merits of the incompetent's claim borders on arbitrary action in absolute disregard of the incompetent's rights and deprives him of his property without due process of law. Accordingly, petitioner prays that a Writ of Certiorari issue to review the decisions of the Court of Appeals and the District Court.

Respectfully submitted,

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Incompetent by his
Guardian Rev. Ildebrando E. Schifalacqua

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 78 - 2242

PHILIP SCHIFALACQUA, a/k/a
PHILIP A. SCHIFALACQUA, AN
INCOMPETENT BY HIS GUARDIAN
REV. ILDEBRANDO E. SCHIFALACQUA,

Appellant

v.

CONTINENTAL CASUALTY COMPANY,a/k/a
CNA INSURANCE and S. Z. GOODSTEIN &
COMPANY, INC.
(Civil No. 78-2009,E.D. of Pa.)

Submitted Under Third Circuit Rule 12(6)

September 7, 1979

BEFORE: SEITZ, Chief Judge, GIBBONS and HIGGINBOTHAM, Circuit Judges.

JUDGMENT ORDER

After consideration of the contention raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

DATED:
September 10, 1979

Seitz
Chief Judge

Attest:
Betty J. Robinson
Deputy Clerk

Certified as a true copy and issued in lieu of a formal mandate on October 2, 1979.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellees as follows:

Brief:.....$188.30

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILIP SCHIFALACQUA, a/k/a PHILIP A. SCHIFALACQUA, an incompetent by his guardian, REV. ILDEBRANDO E. SCHIFALACQUA	: CIVIL ACTION
v.	:
CONTINENTAL CASUALTY COMPANY, a/k/a CNA INSURANCE and S. Z. GOODSTEIN & COMPANY, INC.	: NO. 78-2009

O R D E R

AND NOW, this 21st day of July, 1978, it is ORDERED that the defendants' Motion to Dismiss is GRANTED, and this action is DISMISSED.

John P. Fullam

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILIP SCHIFALACQUA, a/k/a PHILIP A. SCHIFALACQUA, an incompetent by his guardian, REV. ILDEBRANDO E. SCHIFALACQUA	:	CIVIL ACTION
	:	Filed
	:	July 24, 1978
v.	:	
CONTINENTAL CASUALTY COMPANY, a/k/a CNA INSURANCE and S. Z. GOODSTEIN & COMPANY, INC.	:	NO. 78-2009

MEMORANDUM AND ORDER

FULLAM, J. July 21, 1978

The litigation between these parties has had a complicated history. Plaintiff's ward is a medical doctor who was insured under a group policy issued by the defendant Continental Casualty Company. The policy was allowed to lapse, through non-payment of premiums.

Beginning some time before

April of 1973, at a time when the policy was in full force and effect, Dr. Schifalacqua became afflicted with "pre-senile dementia," as a result of which his ability to conduct his daily affairs gradually deteriorated. In October of that year, after the policy had been permitted to lapse, Dr. Schifalacqua was involved in an automobile accident which greatly accelerated the progress of his deterioration, causing him thereafter to be totally disabled. His sister thereafter attempted to reinstate the policy by paying up the back premiums.

The insurance policy provided two kinds of benefits, sickness benefits and accident benefits. In order to qualify for sickness benefits, the claimant must establish that, as a result of sickness which was contracted and commenced while the policy was in effect, he became totally disabled. Thus, entitlement to sickness benefits would not be barred by the fact that disability did not ensue until after the policy had lapsed. On the other hand, however, sickness benefits were limited to a maximum of 24 monthly payments.

The accident benefits, by way of contrast, would be payable only if the accident and disability occurred while the policy was in full force and effect. But the accident benefits extended for the claimant's lifetime,

so long as he was totally disabled.

Initially, plaintiff brought suit against Continental for accident benefits. In the course of the non-jury trial, the issue of possible entitlement to sickness benefits was raised with counsel, but plaintiff's counsel stated that he and his clients had decided to claim accident benefits, for the reason that, up until the October 1973 automobile accident, Dr. Schifalacqua was still drawing his full salary, and therefore was not then totally disabled.

The defendant argued at the first trial that the policy was not in force at the time of the accident and onset of total disability. Plaintiff contended that the later receipt and retention of back premiums had the

effect of reinstating the policy. I ruled in favor of the plaintiff, but the Court of Appeals reversed and directed the entry of judgment in favor of the defendant. Schifalacqua v. CNA Insurance and Continental Casualty Co., ____ F. 2d ____ (3d Cir., Appeal No. 77-1184, Dec. 21, 1977). Plaintiff petitioned for reargument, requesting, inter alia, that the Court of Appeals make clear that its Opinion and Order did not bar further litigation of a possible claim for sickness benefits. The Court of Appeals denied reargument, without further opinion.

Plaintiff has now filed a second lawsuit, claiming sickness benefits. The averments of the Complaint are virtually identical to the averments of the Complaint in the original action, and the findings of

fact made by this Court in that earlier action. The only significant differences are that S. Z. Goodstein & Company, Inc. (manager of the group insurance plan, and alleged to have been acting as agent, servant and employee of the defendant Continental Casualty Company) has been added as a party defendant, and that the claim is for sickness benefits, rather than accident benefits. Specifically, the claim is for benefits for total disability commencing October 6, 1973, and continuing thereafter for 24 months.

If Dr. Schifalacqua's total disability is attributable to disease which had its onset while the group insurance policy was in force, it is indeed unfortunate that the defendant should be able to avoid payment of the benefits provided for disability

caused by illness, merely because plaintiff initially sought to recover lifetime accident-disability benefits. But I find it impossible to avoid the the conclusion that all claims against Continental under the policy are barred by the doctrine of res judicata and law of the case. Unquestionably, claims for sickness benefits could have been asserted in the earlier litigation between the same parties. By the same token, the claims now asserted against the defendant Goodstein & Company are barred by the doctrine of collateral estoppel. That is, Goodstein could not be held liable on the policy itself; the only liability asserted is alleged to have arisen from the failure of Continental to pay benefits; and it is judicially determined that Continental is not required to pay benefits.

For the reasons stated, this action must be dismissed.

ENTERED: 7-24-78

CLERK OF COURT

7-24-78
copies to
George O'Neill
John O'Dea